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16 UNITED STATES DISTRICT COURT
17
18 CENTRAL DISTRICT OF CALIFORNIA

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21 *In re Trader Joe's Tuna Litigation*

22 Case No. 2:16-cv-01371-ODW (AJW)

23 **JOINT SCHEDULING
24 CONFERENCE REPORT**

25 Courtroom: 5D
26 Date: December 11, 2017
27 Time: 1:30 p.m.
28 Judge: Hon. Otis D. Wright II

1 Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and this Court's
 2 Scheduling Conference Order filed October 16, 2017 (Doc. No. 71), counsel for
 3 Plaintiff Atzimba Reyes ("Plaintiff") and Defendants Trader Joe's Company and
 4 Trader Joe's East Inc. ("Defendants," and together with Plaintiff, the "Parties"),
 5 having conferred on November 17, 2017, submit the following Joint Rule 26(f)
 6 Report:

7 **I. SYNOPSIS OF THE PRINCIPAL ISSUES IN THE CASE**

8 **A. Plaintiff's Position¹**

9 Plaintiff alleges that Trader Joe's-brand tuna fish is underfilled and thus
 10 substantially underweight. The exact products at issue are: (i) 5-ounce canned Trader
 11 Joe's Albacore Tuna in Water Salt Added, (ii) 5-ounce canned Trader Joe's Albacore
 12 Tuna in Water Half Salt, (iii) 5-ounce canned Trader Joe's Albacore Tuna in Water
 13 No Salt Added, (iv) 5-ounce canned Trader Joe's Albacore Tuna in Olive Oil Salt
 14 Added, (v) 5-ounce canned Trader Joe's Skipjack Tuna in Water with Sea Salt, and
 15 (vi) 5-ounce canned Trader Joe's Yellowfin Tuna in Olive Oil Solid Light
 16 (collectively, "Trader Joe's Tuna").

17 Specifically, independent testing by a laboratory retained by Plaintiff's counsel
 18 determined that 5-ounce cans of Trader Joe's Albacore Tuna in Water Salt Added
 19 contain an average of only 2.61 ounces of pressed cake tuna when measured precisely
 20 according to the methods specified by 21 C.F.R. § 161.190(c). This is 19.2% below
 21 the federally mandated minimum standard of fill of 3.23 ounces for these cans. *See*
 22 21 C.F.R. § 161.190(c)(2)(i)-(xii). The same tests revealed similar results for the
 23 other varieties of Trader Joe's Tuna at issue.

24 Plaintiff Reyes is a citizen of California who resides in Cypress, California.
 25 While living in California, Plaintiff Reyes purchased one or more 5-ounce cans of
 26 Trader Joe's Albacore Tuna in Water Salt Added for her household and personal use,
 27 which were underfilled and thus substantially underweight, at a Trader Joe's retail

28 ¹ Defendants deny the allegations in this subsection I.A., "Plaintiff's Position."

1 store located in Davis, California. Plaintiff Reyes purchased Trader Joe's Tuna after
 2 she read the label on the can that said it contained an adequate amount of tuna for a 5
 3 oz. can. These representations were substantial factors influencing her decision to
 4 purchase Trader Joe's Albacore Tuna in Water Salt Added. She would not have
 5 purchased Trader Joe's Tuna had she known that the cans were underfilled and
 6 underweight.

7 **B. Defendants' Position**

8 Plaintiff accuses Defendants of wrongdoing for conduct expressly permitted by
 9 the FDA. The gravamen of Plaintiff's claims is that Defendants' canned tuna was
 10 allegedly below a certain weight of pressed cake of tuna in the can and so should
 11 have contained the statement "Below Standard in Fill" on the label. Plaintiff asserts
 12 this conduct violates the FDA's Pressed Weight Standard, 21 C.F.R. § 161.190. For
 13 years, however, the FDA has expressly permitted the nation's largest tuna
 14 manufacturers to omit the statement "Below Standard in Fill," pursuant to a
 15 temporary marketing permit dated June 20, 2014 (the "Tuna TMP") and indefinitely
 16 extended on March 7, 2016. 79 Fed. Reg. 35362, 81 Fed. Reg. 11813.

17 **Last week, on November 21, 2017, the FDA approved Defendants'**
 18 **application to participate in the Tuna TMP**, thereby reaffirming the baselessness
 19 of Plaintiff's claims. The FDA has now expressly approved what Plaintiff accuses
 20 Defendants of doing: omitting the statement "Below Standard in Fill." It is
 21 implausible that a reasonable consumer would be deceived by labels that accurately
 22 disclose net weight (5 oz.) and drained weight (4 oz.) and that have been expressly
 23 approved by the FDA—the very agency that promulgated the standard that Plaintiff
 24 now unconstitutionally seeks to enforce.

25 Defendants believe the principle issues in this case are:

26

- 27 • Whether Plaintiff's claims are preempted, because Congress
 28 prohibits private actions to enforce standards promulgated under
 29 the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §

337, and Plaintiff attempts to bring a private action to enforce a standard promulgated under the FDCA: the Pressed Weight Standard, 21 C.F.R. § 161.190(c).

- Whether a reasonable consumer is likely to be deceived by conduct that the FDA expressly permits Defendants and the nation's three largest tuna brands to engage in, namely, deviating from the U.S. standard of identity for canned tuna by labeling the canned tuna without the statement "Below Standard in Fill" but accurately disclosing net weight (5 oz.) and drained weight (4 oz.).
- Whether Plaintiff or any putative class member actually and reasonably relied on the alleged nondisclosure "Below Standard in Fill" when purchasing Trader Joe's canned tuna.
- Whether Plaintiff or any putative class member was harmed by purchasing Trader Joe's canned tuna.
- Whether Plaintiff or any putative class member has Article III or statutory standing.
- Whether the Pressed Weight Standard violates substantive due process for want of a rational basis, whether its enforcement against Defendants but not against other canned-tuna brands violates equal protection, and whether allowing a California consumer to enforce the Pressed Weight Standard, through incorporation by reference to California's Sherman Law, violates the dormant commerce clause, because it burdens interstate commerce without benefitting, but rather harming, California consumers.
- Whether class certification is appropriate.

1 **II. DISCOVERY PLAN (Fed. R. Civ. P. 26(f)(3))**

2 **A. Rule 26(a) Disclosures:**

3 The Parties will exchange Rule 26(a)(1) initial disclosures on or before
4 December 1, 2017, per the Court's Order Regarding Scheduling (Doc. No. 70), and
5 do not request any changes in the form or requirements for disclosures under Fed. R.
6 Civ. P. 26(a).

7 **B. Discovery Subjects, Scheduling, and Phases:**

8 **1. Subjects on which discovery may be needed**

9 Plaintiff anticipates taking discovery on the following subjects:

- 10 • Sales of Trader Joe's Tuna during the class period.
- 11 • The average retail price of Trader Joe's Tuna during the class
12 period.
- 13 • The suppliers, manufacturers, packagers, or canners that Trader
14 Joe's contracted with to acquire canned tuna to sell during the
15 class period, including but not limited to suppliers, manufacturers,
16 packagers, or canners located in Colombia, Thailand, and
17 Indonesia, and the quantity of canned tuna that Trader Joe's
18 purchased from these entities.
- 19 • Documents and information relevant to the standard of fill for
20 Trader Joe's Tuna during the class period, including but not
21 limited to documents and information concerning the machines
22 used to press Trader Joe's Tuna.
- 23 • The retail stores that sold Trader Joe's Tuna during the class
24 period.
- 25 • Consumer feedback concerning Trader Joe's Tuna during the class
26 period, including but not limited to the number and nature of
27 consumer complaints and the complaints themselves.
- 28 • Any communications with federal or state regulators.
- 29 • Documents and information relevant to identifying consumer
30 purchasers of Trader Joe's Tuna during the class period.
- 31 • Documents and information concerning the claim on the label for
32 Trader Joe's Tuna that the products purportedly contain a net
33 weight of 5 ounces.

- 1 • Documents and information concerning Trader Joe's compliance
2 with the standard of fill requirements, including but not limited to
3 test results.
- 4 • Documents sufficient to show past and present labels of Trader
5 Joe's Tuna sold within the class period.
- 6 • Advertisements for Trader Joe's Tuna during the class period.
- 7 • The processes and methods used to manufacture, can, and package
8 Trader Joe's Tuna within the class period.
- 9 • Documents sufficient to identify any insurance agreement.
- 10 • The financial condition of Trader Joe's.²

11 Defendants anticipate taking discovery on the following subjects:

- 12 • Plaintiff's allegations in the SAC and Defendants' affirmative
13 defenses.
- 14 • Plaintiff's and putative class members' purchases of Trader Joe's
15 canned tuna during the relevant time period.
- 16 • Plaintiff's and putative class members' purchases of other canned
17 tuna during the relevant time period.
- 18 • Plaintiff's and putative class members' alleged reliance on
19 representations or nondisclosures when purchasing Trader Joe's
20 canned tuna, and whether such reliance was reasonable or
21 justifiable.
- 22 • Whether Defendants made any representations or nondisclosures
23 likely to deceive a reasonable consumer.
- 24 • Whether Plaintiff or putative class members were harmed as a
25 result of purchasing Trader Joe's canned tuna.
- 26 • Plaintiff's and putative class members' expectations when
27 purchasing Trader Joe's or other canned tuna.
- 28 • FDA interpretation of the Pressed Weight Standard.
- 29 • FDA policy as to enforcement of the Pressed Weight Standard.
- 30 • History of FDA enforcement of the Pressed Weight Standard.

27 ² Plaintiff has agreed to withhold propounding discovery on this subject (Defendants'
28 financial condition) until after disposition of Plaintiff's motion for class certification.
Defendants do not believe such discovery is appropriate even at that time.

- 1 Other canned-tuna brands' compliance with the Pressed Weight
2 Standard, including Plaintiff's allegation that "Defendants conduct
3 also runs contrary to the standard practices and procedures of
4 other tuna manufacturers." (SAC ¶ 13.)
- 5 NOAA procedures, policies, test results, and communications,
6 including with Plaintiff, relating to the Pressed Weight Standard.
- 7 Documents relating to any other testing of canned tuna
8 commissioned or conducted by Plaintiff, or in Plaintiff's
9 possession.
- 10 Plaintiff's allegation and calculation of damages.

11 2. When discovery should be completed

12 The Parties each served initial discovery requests on November 22, 2017.
13 Prior to disposition of Plaintiff's motion for class certification, the Parties will direct
14 discovery to issues relevant to class certification. Class-certification briefing likely
15 will require expert opinions, so the Parties have allotted time for expert disclosures
and depositions in their proposed briefing schedule for class certification, as follows:

16 DATE	17 EVENT
18 August 3, 2018	Plaintiff to file motion for class certification
19 October 5, 2018	Defendants to file opposition to motion for class certification
20 November 9, 2018	Plaintiff to file reply in support of motion for class certification
21 December 10, 2018	Hearing on motion for class certification

22 The Parties propose that they meet and confer following the Court's disposition
23 of the motion for class certification and then file a supplemental joint scheduling
24 plan, within fourteen days of entry of the Court's order on the motion for class
25 certification.

1 certification, to propose a schedule for any remaining fact and merit expert discovery,
2 dispositive motions, and pretrial deadlines.

3 **3. Whether discovery should be conducted in phases or be
4 limited to or focused on particular issues:**

5 As stated above, prior to disposition of Plaintiff's motion for class certification,
6 the Parties will tailor discovery to issues relevant to class certification, without
7 prejudice to additional discovery, if necessary, following the Court's disposition of
8 the motion for class certification.

9 **C. Electronically Stored Information ("ESI")**

10 The Parties do not anticipate any issues regarding discovery of ESI and will
11 work together in good faith should issues arise. With respect to all discovery, the
12 Parties will draft and enter a stipulated protective order.

13 **D. Claims of Privilege or of Protection as Trial-Preparation Materials:**

14 The Parties do not anticipate any unusual privilege or work-product issues.

15 **E. Changes to Limitations to Discovery Imposed under FRCP or Local
16 Rules:**

17 None requested at this time.

18 **F. Any other Orders the Court Should Issue:**

19 None requested at this time.

20 **III. Additional Prompts from Court's Scheduling Conference Order (Doc. No.
21 71)**

22 **A. Alternative Dispute Resolution**

23 The Parties have not yet engaged in any settlement efforts. The Parties
24 recommend C.D. Cal. Local Rule 16-15.4, ADR PROCEDURE NO. 3, participation
25 in a private dispute resolution proceeding.

26 **B. Trial**

27 The Parties estimate a trial lasting 2-3 weeks. Plaintiff demands a jury trial.

1 **C. Whether Parties are Likely to be Added or the Pleadings Otherwise**
 2 **Amended**

3 Plaintiff does not anticipate adding any parties or amending her Second
 4 Amended Class Action Complaint. Defendants do not anticipate adding any parties
 5 or amending their Answer.

6 **D. A Statement as to Issues Which Any Party Believes May be**
 7 **Determined by Motion**

8 As discussed above, Plaintiff intends to move for class certification on or
 9 before August 3, 2018, which will determine whether this matter shall proceed as a
 10 class action pursuant to Fed R. Civ. P. 23.

11 Defendants may file an early motion for summary judgment to address the
 12 impact of the FDA's approval, dated November 21, 2017, of Defendants' application
 13 to participate in the Tuna TMP.

14
 15 **DATED:** December 1, 2017 PARKS & SOLAR, LLP

16 By: /s/ Robert J. Parks
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 20 Attorneys for Defendants
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21 **DATED:** December 1, 2017 BURSOR & FISHER, P.A.

22 By: /s/ L. Timothy Fisher
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Signature Certification

In accordance with Civil Local Rule 5-4.3.4(a)(2), I certify that the content of this document is acceptable to L. Timothy Fisher and that I have obtained authorization from him to affix his electronic signature to this document.

By: /s/ Robert J. Parks

Robert J. Parks, Esq.